



October 27, 2020

Mr. Kelly Laycock
Oceans, Wetlands and Stream Protection Branch
USEPA Region 4
61 Forsyth Street
Atlanta, GA 30303

Email: 404Assumption-FL@EPA.gov

RE: **Florida Request to Assume Section 404 Program
Docket EPA-OW-2018-0640**

Dear Mr. Laycock:

The Brevard Indian River Lagoon Coalition (BIRLC) hereby requests that the US EPA deny the State of Florida's request to assume the responsibilities for administering the Section 404 program due to insufficiencies in the State's plan. In the alternative, BIRLC asks that US EPA extend its current rushed schedule of making a decision by December 17, 2020 by at least 180 days to allow meaningful public review and comment which has been impossible by the short time frame during an extraordinary time of national crisis brought on by the COVID-19 pandemic.

BIRLC is a non-profit organization dedicated to promoting the protection and improvement of the Indian River Lagoon and the wetlands and water courses within in its watershed. We actively support Brevard County's Save Our Indian River Lagoon (SOIRL) initiative and ongoing efforts to restore the water quality of the Lagoon.

Florida's Request for Delegation Should Be Denied Because It Will Not Provide Required Protections for Sensitive Wetlands and Water Courses

The Proposed Delegation Is Inadequate in Its Details and Requirements

To the limited extent that BIRLC has been able to review the record in this matter, given the inadequate time allowed and the pressures of the COVID-19 crisis, it appears that there are deficiencies in the plan both with respect to the scope of the delegation and in the demonstrated ability of the Florida Department of Environmental Protection (FDEP) to adequately administer it.

Under the current Section 404 Program administered by the U.S Army Corps of Engineers (USACE), applications for dredge and fill permits into the waters of the United States are available for public review and comment. In particular, significant activities requiring an individual permit are subject to the rigorous NEPA environmental impact review process. It appears that the proposed plan does not provide explicitly for that same level of public scrutiny either for activities that will be covered by a general permit or, more importantly, activities requiring an individual permit. In order for the waters of Florida to be adequately protected, it is imperative that all permits be subject to environmental review by other environmental agencies and the general public.

The FDEP Does Not Have Sufficient Resources to Execute the Required Reviews

Beyond the lack of a necessary requirement for review, Florida's submission does not demonstrate adequate staffing support for execution of the program. While there is an assertion in the State's submission that it has adequate staff for the effort, there is no demonstration verifying this commitment and no assurance that sufficient staff will continue to be available in future years.

This failure is made all the more serious because the history of the FDEP funding and staffing is one of steadily decreasing resources. Consider the following diminishing staffing, decreasing 450 in the past nine years.

Fiscal Year	FDEP Positions	Change from previous Staff	Citation
2011-12	3,450	NA	Note 1
2012-13	3,364	-86	Note 1
2013-14	3,115	-116	Note 1
2014-15	3,063	-52	Note 1
2015-16	2,939	-155	Note 1
NA			
2019-20	2,900	-39	Note 2

Note 1:

https://en.wikipedia.org/wiki/Florida_Department_of_Environmental_Protection#Budget_and_staff

Note 2: Staff <https://floridadep.gov/sec>

The FDEP is struggling to protect the State's wetlands now and will be unable to protect the additional wetlands under the Assumption of the 404 Program. While the staff of the FDEP does its best, history shows that FDEP has been unsuccessful at protecting and preserving our wetlands. Florida has lost over 60% (12 M acres) of its wetlands to date and lost more than 144,000 non-Federal acres of Rural lands between 2012-17.

(https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1262239.pdf, 2017

NRI Summary Report (EPA-HQ-OW-2018-0640-0009), Table 1). The National Oceanic and Atmospheric Administration reported in 2014 that Lee and Collier counties alone had lost more than 30,000 acres of wetlands since 1996.

The analyses required under the delegation of Section 404 will only require more technical sophistication and staff to match the work currently being done by the USACE. This is beyond the capability of the FDEP. As illustrated in the Table above, the staff and funding of the FDEP has followed a nearly uniform pattern of decrease so it is unreasonable to believe that the FDEP will somehow miraculously find the resources necessary to do the job required.

Economic Impacts from the Current COVID-19 Crisis will Further Limit FDEP's Ability to Resource the Delegate Requirements

We all recognize that Florida's waters are a jewel of the state and, once destroyed, are nearly impossible to restore. Real estate demand remains very active in Florida, even during the COVID-19 crisis. The Florida Realtors Association reports that residential sales were up nearly 9% year-to-year in August 2020, with an average price increase of more than 13%. (<https://media.floridarealtors.org/wp-content/uploads/2020/09/August-2020-Fla-MSA-summary.pdf>). This demonstrates that demand for additional land, especially near water, is continuing to grow in Florida.

Florida lost more than 60% of its wetlands, approximately 12M acres, by 2004 (https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1101626.pdf) and continues to lose them at a rate more than 8,500 acres per year. (https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1262239.pdf).

There are unfortunately numerous examples of developers playing fast and loose with wetland drainage. (<http://cleanupcityofstaugustine.blogspot.com/2015/11/the-matrix-wetlands-of-mass-destruction.html> 2006 and <https://www.winknews.com/2018/02/10/florida-developer-pays-350k-fine-filling-wetland/>)

At present, the 404 Program is administered objectively by the USACE accepting public input as appropriate. By removing federal oversight, and relying solely on the state government, the review of applications could become susceptible to political pressure to the detriment of the environment.

At a Minimum, the Public Review Process should be Extended by 180 days in light of the COVID-19 Crisis and the 2020 Election Period.

Because the entire Delegation process has been conducted during the COVID-19 pandemic and during the 2020 General Election period, additional time must be allowed

for a meaningful public review to take place. Further, based on the history of this request, there is no urgency that requires immediate action.

The DEP published proposed rules to create the State 404 Program on February 19, 2020. Ten days later, on March 1, Governor DeSantis issued an executive order declaring a public health emergency due to the COVID-19 virus (Exec. Order No. 20-15). Since that time, Florida has been one of the states most affected by this virus, causing major disruptions in the regular business, including public attention to government rulemaking.

On August 20, the State filed a program submission for regulating discharges of dredged or fill material into waters within the jurisdiction of the State and the US EPA set forth a schedule restricting public comment to a mere 45 days and a commitment to render a decision by December 17.

During the period between August 20 and the first public hearing on this matter, held on October 21st, Florida recorded 166,418 new COVID cases and 5,972 deaths (<https://coronavirus.jhu.edu/>). The ongoing state of emergency has seriously limited the ability of interested parties to become aware of, review and comment on the proposed delegation.

By its own terms, the US EPA and the State of Florida are NOT required to act in such an accelerated time frame but rather, the 120-day decision making period "...may be extended by mutual agreement of the state and EPA." It is noteworthy that the State took some two years to write its proposal following Governor's signing of the authorizing legislation in 2018. Given this time frame, a few additional weeks to allow for meaningful review by the population potentially affected by this process is certainly justified.

Therefore, the BIRLC emphatically calls for at least a 180-day delay in the decision-making process and for US EPA to hold additional webinar hearings to gather meaningful input.

Very truly yours,
Brevard Indian River Coalition

Vincent Lamb
Chair